FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

BRIEF OF RESPONDENT

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In the
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No. 78-6885

FLYNN NOYE HICKS,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

BRIEF OF RESPONDENT

OPINION BELOW

This is an appeal resulting from a judgment and sentence rendered in the District Court of Oklahoma County, State of Oklahoma on April 22, 1977. Therein Petitioner was tried and convicted by a jury of Unlawful Possession of Heroin with Intent to Distribute in violation of 63 O.S. Supp. 1976, § 2-401. The jury assessed punishment in accordance with the Oklahoma Habitual Criminal Act, 21 O.S. Supp. 1977, § 51(B), for a term of forty (40) years imprisonment. The record of the aforesaid proceedings has been transmitted to this Court in its entirety by the Clerk of the Oklahoma Supreme Court.

Petitioner thereafter perfected his appeal to the Oklahoma Court of Criminal Appeals and in an unpublished opinion (App. 57) dated March 8, 1979, the court affirmed the aforesaid judgment and sentence.

From the unpublished decision of the Oklahoma Court of Criminal Appeals, Petitioner seeks appropriate review to this Court.

JURISDICTION

The authority of this Court to review the initial Judgment and Sentence entered at the trial court level, together with the unpublished opinion of the Oklahoma Court of Criminal Appeals, is authorized by 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions cited by Petitioner at pages 2-4 of his brief, Respondent additionally submits the following:

21 O.S. § 927:

"Where the jury finds a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court shall assess and declare punishment and render the judgment accordingly."

22 O.S. § 1066:

"The Appellate Court may reverse, affirm, or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the court, within the time, and in the manner, to be prescribed by rule of the court."

QUESTIONS PRESENTED

1. Whether Petitioner was denied due process of law when the Oklahoma Court of Criminal Appeals failed to remand this cause for jury sentencing anew upon its determination that Petitioner had been sentenced under a portion of Oklahoma Habitual Criminal Act rendered unconstitutional in *Thigpen* v. *State*, 571 P.2d 447 (1977), where no statutory enactment existed for empaneling a jury to redetermine punishment following appellate review?

2. Whether the failure of a statute to provide meaningful standards to guide the determination of a discretionary sentence in a noncapital offense violates the Due Process Clause of the Fourteenth Amendment?

3. Whether the imposition of a mandatory forty (40) years imprisonment assessed by a jury against Petitioner as a third-time offender was excessive and violative of the Eighth Amendment prohibition against cruel and unusual punishment?

4. Whether Petitioner's classification as a third-time offender under the Oklahoma Habitual Criminal Act, 22 O.S. Supp. 1977, § 51(B), operated to deny him of an asserted right to be resentenced anew when the Oklahoma Court of Criminal Appeals determined that the statute under which the jury was instructed to impose sentence was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

The textual portion of Petitioner's Statement of the Case (Brief of the Petitioner at 6-12) is adequate.

However, Petitioner incorrectly relates to this Court at page 10 of his Brief that Petitioner was not given an opportunity to present evidence to the jury in mitigation of punishment. On the contrary, Petitioner elected to stand mute as did co-defendant Jones during the bifurcated stage of the sentencing proceeding at the trial court level (App. 19).

Although Petitioner was convicted by the jury on April 14, 1977, the court did not pronounce sentence in accordance with the verdict until April 21, 1977. On that date, the court inquired of Petitioner as to whether he desired to make any statements to the court prior to pronouncement of judgment. Petitioner's only response was that he was "innocent" (App. 34).

Further, Respondent would not agree with Petitioner's contention at page 10 of his Brief (as later argued) that the provisions of 22 O.S. § 926 required the Oklahoma Court of Criminal Appeals to remand this cause to the District Court for a new trial on sentencing.

Petitioner was afforded appellate review to the Oklahoma Court of Criminal Appeals at public expense. The Public Defender's Office duly prepared and filed a brief on behalf of Petitioner. The court entered its written findngs in an unpublished opinion filed on March 8, 1979. Thereafter, Petitioner, acting *pro se*, filed a Petition for Rehearing which was denied. Thus, there can be no allusion of secrecy

displayed on the part of the Oklahoma Court of Criminal Appeals as contended by Petitioner.

The record of proceedings conducted at the trial court level, including the transcript, and all pleadings filed subsequent to the imposition of judgment and sentence are before this Court to assist in a correct determination of the factual allegations which, through subtle innuendos, have been distorted by Petitioner to create the appearance of a mammoth conspiracy on the part of the State of Oklahoma to send a seemingly innocent man to the penitentiary in derogation of his constitutional rights.

SUMMARY OF ARGUMENT

I. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. *The failure of the Oklahoma Court of Criminal Appeals to remand this cause for jury sentencing anew for imposition of punishment under 21 O.S. Supp., § 51(A), did not constitute a denial of due process.* Oklahoma does not guarantee an individual the right to be resentenced anew by a jury following appellate review, nor does the due process clause of the United States Constitution mandatorily require such a procedural protection. *Rose* v. *Hodges*, 423 U.S. 19. The invalidation of a portion of one section of a statute does not affect the remaining provisions of the statute if the overall legislative intent may be carried out. *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210. The Oklahoma Court of Criminal Appeals correctly found the absence of a fundamental error and exercised its

discretionary authority in affirming the sentence where no statutory vehicle existed for the empaneling of a new jury to determine sentence. 22 O.S. § 1066.

B. *The Due Process Clause does not extend the procedural requirements of notice, a hearing and an opportunity to present mitigating circumstances beyond the trial court level to encompass appellate review affirming the initial imposition of sentence.* There is no constitutional right under the Due Process Clause of the Federal Constitution to a hearing or oral argument. *Price* v. *Johnston,* 334 U.S. 266. Petitioner was given notice, a separate hearing and an opportunity to present circumstances in mitigation of punishment to the jury at the trial level. *Oyler* v. *Boles,* 368 U.S. 448. This is the essence of due process.

C. *Failure of a statute to provide meaningul standards to guide the determination of a discretionary sentence in a noncapital offense does not violate the Due Process Clause of the Fourteenth Amendment.* Legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases. *Lockett* v. *Ohio,* 438 U.S. 586. Individualized sentencing in criminal cases has long been recognized. *Williams* v. *New York,* 337 U.S. 247. The State of Oklahoma affords an individual adequate procedural protections to prevent the arbitrary and capricious imposition of punishment which is disproportionate to the seriousness of the offense.

D. *The opinion of the Oklahoma Court of Criminal Appeals contained a sufficient rationale to support the affirmance of Petitioner's punishment.* The Court of Criminal Appeals' affirmance of punishment was not a resentencing

proceeding. *Rose* v. *Hodges,* 423 U.S. 19. Petitioner was sentenced by a jury upon a record sufficient to support the sentence.

II. THE IMPOSITION OF FORTY (40) YEARS IMPRISONMENT ASSESSED AGAINST PETITIONER AS A THIRD-TIME HABITUAL OFFENDER UNDER THE OKLAHOMA HABITUAL CRIMINAL ACT, 21 O.S. SUPP. 1977, § 51(A), WAS NOT EXCESSIVE NOR DISPROPORTIONATE TO THE PRIOR CRIMES; AND, THUS, SUCH SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

A. *The term of imprisonment bears a rational relationship to the goal of the Oklahoma Legislature to provide enhanced punishment for habitual criminal offenders and, therefore, does not constitute the needless imposition of pain and suffering.* A sentence of imprisonment has never been held to be cruel and unusual solely on the basis of length. *Howard* v. *Fleming,* 191 U.S. 126. Petitioner's forty (40) year punishment was not disproportionate to his three prior convictions and reasonably related to the Legislature's goal of protecting society from a habitual offender by providing enhanced punishment. *Gregg* v. *Georgia,* 428 U.S. 153.

B. *The Court of Criminal Appeals did not arbitrarily and capriciously impose punishment in violation of the Eighth Amendment prohibition against cruel and unusual punishment.* Unless the Court of Criminal Appeals can determine that the sentence is so excessive as to shock the conscience of the court, there is no power to modify the sentence. *Holding* v. *State,* 568 P.2d 332 (Okl.Cr. 1977).

III. PETITIONER'S CLASSIFICATION AS A THIRD-TIME OFFENDER AND SUBJECT TO PUNISHMENT PRESCRBED BY 22 O.S. 1977, § 51(B), DID NOT DEPRIVE HIM OF FEDERAL AND STATE GUARANTEED RIGHTS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Oklahoma Legislature properly singled out a classification of individuals as habitual offenders and within that classification made a distinction between the punishment for second felony offenders and that punishment for third or subsequent offenders. *San Antonio School Dist.* v. *Rodriguez,* 411 U.S. 1. The sub-classification of third-time habitual offenders under Section 51(B) did not operate to deprive those individuals of any state or federal right exercised by offenders subject to punishment under Section 51(A), even though Section 51(B) was declared unconstitutional subsequent to Petitioner's conviction.

ARGUMENT

I. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. The Failure of the Oklahoma Court of Criminal Appeals to Remand This Cause for Jury Sentencing Anew for Imposition of Punishment Under the Provisions of 21 O.S. Supp. § 51(A) Did Not Constitute a Denial of Due Process.

Petitioner's initial argument emphasizes that the invalidation of Section 51(B) of the Oklahoma Habitual Criminal Act by the Oklahoma Court of Criminal Appeals in the decision of *Thigpen* v. *Oklahoma,* 571 P.2d 467 (1977), resulted in Petitioner's initial forty (40) year sentence being rendered absolutely void and of no effect.[1]

However, the crux of Petitioner's assertion is that by upholding the original sentence and finding it to be within the realm of the remaining provision of Section 51(A) of the Act, the Oklahoma Court of Criminal Appeals in effect became a jury of twelve men and, thus, deprived Hicks of his right to be sentenced by a jury pursuant to 22 O.S.

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[1] Petitioner supports this position by citing three cases, namely *Brown* v. *State,* 24 P.2d 1013 (1933); *Karns* v. *State,* 224 P. 373 (Ok.Cr. 1924); and *Ex Parte Lange,* 18 Wall. 163, 85 U.S. 872, 879. In *Brown,* supra, and *Karns,* supra, the Court of Criminal Appeals determined that the Oklahoma Legislature's attempt to punish an individual for the operation of a distillery exceeded the constitutional limitations of punishment, *i.e.,* reclassifying the crime from a misdemeanor to a felony and providing for increased punishment. Therefore, the Legislature had no authority to prohibit or punish an offender by enacting legislation in conflict with the constitution. Such is not the case in the instant action.

§ 926,[2] in violation of the due process clause of the Fourteenth Amendment.[3]

In countering Petitioner's first proposal, the State would first submit that an individual's right to have his *sentence* determined by a jury is not embodied within the Due Process Clause of the Fourteenth Amendment or any other provision of the United States Constitution. Beginning with *Buchalter* v. *New York*, 319 U.S. 427, 429-430 (1943), this Court recognized that:

> ". . .the failure of a state to afford a particular defendant the benefit of established procedures under state law, may, however result in a denial of due process when the error made by the state court renders the state proceedings so fundamentally unfair or so fundamentally deficient that they are inconsistent with the rudimentary demands of fair procedure."

The inherent fallacy in Petitioner's due process argument is his attempt to equate the recognized state procedural right under 22 O.S. § 926 to have a sentence imposed by a jury with an *asserted* right to be *resentenced anew* following appellate review of the judgment and sentence.

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[2] 22 O.S. § 926 provides:

> "In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant, assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided."

[3] This method of sentencing is not absolute. 21 O.S. § 927 provides:

> "Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render the judgment accordingly."

Since the rendition of the *Thigpen* decision, supra, the Oklahoma Court of Criminal Appeals has been required to review a number of cases questioning the imposition of punishment under Section 51(B) of the Oklahoma Habitual Criminal Act. The relevant portion of the *Thigpen* decision determined as follows:

> "We are of the opinion that it was the legislative intent in enacting the provisions of 21 O.S. Supp. 1976, §51(A) and §51(B), to authorize progressively greater punishments for habitual criminals; Section 51(B), however, is so vague and illusory when construed with Section 51(A) that it cannot be construed in such a manner as to implement the legislative intent, and because of its vagueness and demonstrated defects we are of the opinion that 21 O.S. Supp. 1976, §51(B), is unconstitutional and that the trial court would have erred had an instruction been given thereunder."

The Oklahoma Court went on to add:

> "Since the provisions of 21 O.S. Supp. 1976, §51, contain a severability clause, our holding today in no way impairs the validity of 21 O.S. Supp. 1976, §51 (A)."

It may, therefore, be seen that Petitioner's initial conclusion that his sentence was void and of no effect is questionable; and, clearly, Petitioner's averment that he was sentenced under an entirely different statute is clearly erroneous. The general rule remains that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute.[4]

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[4] *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 76 L.Ed. 1063; *Williams* v. *State*, 542 P.2d 554, *vacated*, 428 U.S. 907, 49 L.Ed. 2d 1215, *on remand*, 554 P.2d 109 (1975); *Potter* v. *State*, 509 P.2d 933 (1973).

It should be remembered that this Court has never recognized a constitutional right to be sentenced anew following appellate review. This position was alluded to in the case of *Rose* v. *Hodges,* 423 U.S. 19, wherein respondents urged their Fourteenth and Sixth Amendments right to jury trial had been infringed when the Governor commuted their sentence of death following *Furman,*[5] to a term of 99 years.

In *Rose,* supra, this Court clearly distinguished between a federally protected right to a jury trial under the Sixth Amendment and the Fourteenth Amendment and an *asserted* right to be sentenced anew. The language used by this Court in the body of the *Rose* opinion, supra, noted:

> "Neither *Furman*[6] nor any other holding of this court requires that following such a commutation the defendant shall be entitled to have his sentence determined anew by a jury."

However, in support of his position, Petitioner relies heavily on the Eighth Circuit decision of *Klimas* v. *Mabry,* 599 F.2d 842 (1977), as a case presenting facts "strikingly similar" to Petitioner's situation. Klimas was charged by the State of Arkansas as a habitual offender.[7] The jury

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[5] *Furman* v. *Georgia,* 408 U.S. 238 (1972), *reh. den.,* 409 U.S. 902.

[6] *Id.* See Note 5.

[7] Ark. Stat. Ann. § 43-2328 provides:

> *"Second or subsequent convictions — Sentence.* — Any person convicted of an offense, which is punishable by imprisonment in the penitentiary, who shall subsequently be convicted of another such offense, shall be punished as follows:
>
> "(1) If the second offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one (1) year more than the minimum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than the maximum sentence provided by law for this offense, unless the maximum sentence is less than the minimum sentence plus one (1) year, in which case the longer term shall govern.
>
> "(2) If the third offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the person shall be sentenced to imprisonment for a determinate term not less than three (3) years more than the minimum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than the maximum sentence provided by law for the offense, unless the maximum sentence is less than the minimum sentence plus three (3) years, in which case the longer term shall govern.
>
> "(3) If the fourth or subsequent offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the person shall be sentenced to imprisonment for the fourth or subsequent offense for a determinate term not less than the maximum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than one and one-half (1½) times the maximum sentence provided by law for a first conviction; provided, that any person convicted of a fourth or subsequent offense shall be sentenced to imprisonment for not less than five (5) years."

in the *Klimas* case imposed a term of sixty-three (63) years imprisonment based upon the State's presentation during the second stage sentencing hearing of seven previous felonies in the State of Missouri and six petty burglary offenses in the State of Arkansas.

Klimas appealed his conviction and sentence to the Arkansas Supreme Court; and in its initial opinion, the court remanded the case for a new trial for the reason that the Missouri convictions were inadmissible in the senten-

cing enhancement proceeding because the convictions were silent concerning his representation by counsel. On rehearing, however, the Arkansas Court modified the punishment of Klimas to forty-two years by calculating the sentence under the Arkansas Habitual Criminal Act on the basis of the six petty burglary convictions rendered in the State of Arkansas.

Klimas subsequently filed for writ of habeas corpus in federal district court, alleging a denial of due process by reason of the denial of the Arkansas Court to remand for sentencing anew. The district court subsequently dismissed the action for lack of jurisdiction.

The Eighth Circuit on review of the lower court's dismissal determined that under the particular facts of the case, the failure of the Arkansas Supreme Court to follow the sentencing procedure required by the Arkansas Habitual Criminal Act,[8] Ark. Stat. Ann. § 41-1005 or § 43-2330.1,

[8] Ark. Stat. Ann. § 41-1005 or § 43-2330.1 provide as follows:

§ 41-1005:

"Procedure for imposing sentence to extended term of imprisonment. — The following procedure shall govern trials at which a sentence to an extended term of imprisonment is sought pursuant to Section 1001 [§ 41-1001]:

"(1) The jury shall first hear all evidence relevant to the felony with which defendant is currently charged and shall retire to reach a verdict of guilty or innocence on this charge.

"(2) If the defendant is found guilty of the felony, the same jury shall sit again and hear evidence of the defendant's previous felony convictions or previous findings of the defendant's guilt of felonies. Defendant shall have the right to hear and controvert such evidence and to offer evidence in his support.

"(3) The jury shall retire again, and if it finds that the defendant has previously been convicted or found guilty of two [2] or more felonies, the jury shall consider the previous convictions or findings of guilt in determining the sentence to be imposed for the felony of which the defendant currently stands convicted."

§ 43-2330.1:

"Trial procedure for habitual criminals. — The following trial procedure shall be adhered to in cases involving habitual criminals:

"(1) The jury shall first hear all of the evidence pertaining to the current charge against the defendant and shall retire to reach its verdict, as to this charged, based only upon such evidence; provided, however, that nothing herein shall prohibit cross-examination of a defendant as to previous convictions when the defendant takes the stand in his own defense.

"(2) If the defendant is found guilty, the same jury shall sit again and hear evidence of defendant's prior conviction(s). Provided, that the defendant shall have the right to deny the existence of any prior conviction(s), and to offer evidence in support thereof.

"(3) The jury shall again retire, and if it is found that the prior conviction(s) exists, or if the defendant admits such previous conviction(s) then the prior conviction(s) shall be considered in fixing the punishment for the current offense for which the defendant has been convicted in accordance with Section 1 [§ 43-2328] hereof."

The foregoing sections of the Arkansas Habitual Criminal Act were specifically enacted by the Legislature to govern the sentencing provisions of a habitual offender. Oklahoma has no such controlling statute which would govern the procedural aspects of jury sentencing other than the general provisions of 22 O.S. § 926.

in the resentencing of Klimas after the rehearing of his case resulted in a deprivation of due process which justified the granting of habeas relief. The Circuit Court further stated at page 849:

> "Retrial of a criminal defendant on a habitual criminal charge may be a futile gesture where evidence of convictions, which was properly submitted to the jury, is unchallenged by the defendant. See, e.g., *Roach* v. *State*, 255 Ark. 773, 503 S.W.2d 467, 471 (1973). In

this case, however, Klimas's right to a retrial of the habitual offender charge is of importance since the provisions of the Arkansas Habitual Criminal Act were changed between the time of his state court trial and the time of the modification of his sentence by the Arkansas Supreme Court."

The change in the status of the Arkansas Habitual Criminal Act substantially affected the minimum and maximum penalty which Klimas could conceivably receive at a new sentencing proceeding. Therefore, the Eighth Circuit determined that there existed *substantial prejudice* to Klimas by reason of the Arkansas Supreme Court's failure to afford Klimas a new sentencing proceeding.

The Oklahoma Habitual Criminal Act had not been modified at the time Hicks' case was reviewed by the Oklahoma Court of Criminal Appeals, although a portion of the Act remained inoperative as a result of the *Thigpen* decision.

In addition, the record reviewed by the Court of Criminal Appeals contained sufficient evidence of prior convictions to warrant the imposition of forty (40) years as distinguished from the Eighth Circuit's finding in Klimas that it was impossible to determine from the jury's verdict which three prior offenses were used by the jury to impose the enhanced sentence.[9]

[9] Respondent submits that there existed an underlying cause for the Eighth Circuit's decision to reverse the Arkansas Supreme Court in *Klimas, i.e.,* the inadmissibility of the six (6) Missouri convictions during the second stage. Thus, the finding by the Circuit of a denial of due process by reason of the Supreme Court's failure to remand for resentencing in accordance with state procedure was merely used as a

The State of Oklahoma does not propose to this Court that the sentence imposed by the Hicks jury would have remained consistent under an instruction of punishment pursuant to Section 51(A).

Respondent merely submits that the Oklahoma Court of Criminal Appeals exercised its authority consistent with its power to review[10] (a point which is not challenged by Petitioner) and determined from the entire record that the defendant was not sufficiently prejudiced to require modification of punishment.

By its own case law, the Oklahoma Court of Criminal Appeals has limited its power to modify sentences to those instances where it is apparent that an injustice has been done.[11]

[9] (Continued)
vehicle in order to accomplish justifiable relief. In other words, the Arkansas Supreme Court abused its discretionary power of review when it refused to remand the case in light of the existence of fundamental constitutional errors. In the case at bar, the Oklahoma Court of Criminal Appeals found no fundamental error to exist, and Respondent submits that this determination was entirely proper based upon a review of the entire record.

[10] 22 O.S. § 1066 provides in part:

"Power of appellate court — Return by clerk of lower court when new trial granted

"The Appellate Court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the court, within the time, and in the manner, to be prescribed by rule of the court."

[11] *Fritz* v. *State,* 128 P. 170 (1912).

Can this Court say that given the habitual criminal record of the Petitioner[12] the failure of the Court of Criminal Appeals to remand this cause for further sentencing constitutes a *substantial* denial of the rudimentary demands of fair procedure? Can this Court say that Petitioner was denied due process of law of a federally protected right when neither the Constitution or the laws of the State of Oklahoma demand sentencing anew? Such a determination cannot be measured in terms of years but must be weighed consciously with the fundamental rights of an accused to be afforded certain procedural safeguards consistent with due process in order to thwart the arbitrary and inconsistent acts committed by our system of criminal justice.

As Petitioner well concedes, not every deprivation of a liberty entitlement need rise to the level of constitutional protection.[13] The State of Oklahoma does not dispute the fact that Petitioner Hicks has been deprived of a protected liberty interest insofar as he is now under the custodial supervision of the Oklahoma Department of Corrections. Nor does the State cordially ignore the grievous loss which Petitioner must endure as a result of his failure to conform to the laws of this State. But when Petitioner attempts to correlate this admitted "grievous loss" in terms of years, then such a position cannot be determined under the auspices of a denial of due process, but such a determination must be examined in light of whether the evidence was sufficient to support the imposition and affirmance of pun-

[12]Unlike *Klimas*, there is no underlying attack upon the admissibility of the prior offenses committed by Hicks during the enhancement stage.

[13]*Goss* v. *Lopez*, 419 U.S. 565, 576, 580.

ishment which the Oklahoma Court was empowered by statute to do.[14]

The rudimentary demands of fairness embodied in the due process clause cannot be stymied at a particular point in the procedural development of a criminal case. But to extend the interpretation of the due process clause to a situation where a court of review allegedly reimposes punishment would clearly undermine the legislative posture of defining crimes and declaring appropriate punishment consistent with public policy and undoubtedly restrict appellate authority to modify, reverse, remand or affirm the decision of twelve jurors absent a clear showing of injustice.

For the above and foregoing reasons the State submits that the Petitioner was not denied due process of law by the failure of the Oklahoma Court of Criminal Appeals to remand for sentencing anew.

B. Petitioner Was Not Entitled to Notice, a Hearing or an Opportunity to Present Mitigating Evidence Before the Oklahoma Court of Criminal Appeals During Appellate Review; and, Therefore, No Violation of the Due Process Clause of the Fourteenth Amendment Resulted.

Flynn Noye Hicks was tried and convicted before a jury in Oklahoma County pursuant to his election under 22 O.S. § 926. Thereafter, a second stage sentencing proceeding was conducted; and, upon the conclusion of the

[14]Petitioner was afforded minimal due process prior to the verdict of guilty and imposition of punishment, *i.e.*, he was sentenced under a valid statute and in conformity with 22 O.S. § 926.

evidence, the jury retired and returned a sentence of imprisonment against Petitioner and co-defendant Jones.

The procedural aspects of the entire trial, including the second stage, are not contested by Petitioner as being fundamentally defective under the mandates of the Due Process Clause of the Fourteenth Amendment. Rather, Petitioner's due process argument encompasses the failure of the Oklahoma Court of Criminal Appeals to remand this cause for a new sentencing hearing subsequent to its finding that that portion of the Habitual Criminal Act under which the jury was instructed [§ 51(B)] was found to be unconstitutional in a prior unrelated case. The court refused to modify Hicks' sentence and concluded Petitioner was not sufficiently prejudiced to merit further proceedings at the trial court level.

Based upon the court's asserted reimposition of punishment under Section 51(A), Petitioner contends he was entitled to notice, a hearing and an opportunity to present mitigating circumstances *prior* to the decision of the Court of Criminal Appeals.

It may be seen that where an individual is charged by the State under a recidivist statute, the habitual criminal issue is "a distinct issue" on which a defendant "must receive reasonable notice and an opportunity to be heard." *Oyler* v. *Boles,* 368 U.S. 448, 452; *Chandler* v. *Fretag,* 348 U.S. 3, 8. Procedural due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. *And there must be findings adequate to make meaningful*

any appeal that is allowed.[15] *Specht* v. *Patterson,* 386 U.S. 605.

Respondent, therefore, acknowledges the basic concept that the separate sentencing process must satisfy the requirements of due process, limited, however, to only those proceedings arising at the trial court level. As stated by this Court in *Gardner* v. *Florida,* 430 U.S. 349, 354:

> "It is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."

However, Petitioner seeks to interpret these basic due process requirements as being applicable beyond the trial court level to encompass the situation where an appellate court, upon a review of the original judgment and sentence, renders an opinion modifying, or as Petitioner asserts, reimposes a sentence of punishment.

Petitioner in his brief presents expository authority as to what specific due process procedures are required in the context of imposition of a discretionary sentence.[16]

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[15]Petitioner does not attack the sufficiency of the record supportive of a meaningful appeal.

[16]*Boddie* v. *Connecticutt,* 401 U.S. 371, 378 (emphasis on nature of interest); *Woodson* v. *North Carolina,* 428 U.S. 280, 304 (emphasis on particular offender); *Morissey* v. *Brewer,* 408 U.S. 471 at 481 (requiring notice and hearing prior to parole or probation); *Mempa* v. *Rhay,* 398 U.S. 128 (requiring defendant be provided with copy of presentence report).

The State of Oklahoma again joins in the analysis[17] made by Petitioner and concurs that the sentencing stage of proceedings is embodied within the procedural protections of the Due Process Clause as delineated by the cited cases.

However, the critical and obvious distinction promulgated by the State of Oklahoma is that there is *no constitutional right to be resentenced anew* nor should the Due Process Clause be interpreted by this Court in this case to require such a procedural device.

Petitioner was afforded an opportunity to present mitigating factors to the jury prior to its determination of sentence (App. 19). He was represented by counsel during the sentencing stage and appointed counsel argued "that if you believe forty years for one sale of heroin is so excessive, so unfair, then sign the verdict form which says five to twenty years and zero dollars . . . We want your justice" (App. 22).

Prior to the actual imposition of sentence by the trial court, Petitioner was afforded his right of allocution. His only statement to the court was his emphatic portrayal of innocence to which the trial court replied: ". . . that's what the jury is all about" (App. 34).

How many opportunities must the State afford to a particular offender to persuade the trier of punishment to impose leniency in order to satisfy the fundamental pro-

[17]Not the ultimate conclusion reached by Petitioner that the Due Process Clause requires notice, an opportunity to a hearing and presentation of mitigating factors at the appellate level of review.

cedural protections of the due process clause? Petitioner has already been afforded three, *i.e.*, plea of leniency to the jury, to the trial court and an appellate review at public expense to the Oklahoma Court of Criminal Appeals.

The State of Oklahoma respectfully submits that it has adhered to the dictates of procedural due process in affording Petitioner every opportunity required by state and federal standards and, therefore, Petitioner's contention of error in this respect cannot be sustained.

C. Failure of a Statute to Provide Meaningful Standards to Guide the Determination of a Discretionary Sentence in a Non-Capital Offense Does Not Violate the Due Process Clause of the Fourteenth Amendment.

Petitioner urges this Court to rule as a matter of law that in noncapital cases, sentencing legislation must contain meaningful sentencing standards for the trial court or jury to follow when the statute provides for the imposition of an indeterminate sentence in noncapital cases.

Until now this Court has only required such standards to be embraced in sentencing legislation which provides for the penalty of death,[18] and in the decision of *Lockett* v. *Ohio*, 438 U.S. 586 (1978), this Court reiterated:

> ". . . legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases."

[18]*Furman* v. *Georgia*, 408 U.S. 238; *Roberts* v. *Louisiana*, 428 U.S. 325; *Woodson* v. *North Carolina*, 428 U.S. 280; *Gregg* v. *Georgia*, 428 U.S. 153.

Petitioner concedes that the Legislature, not the courts, has the authority for determining the severity of sentences for various crimes.[19]

Assuming, *arguendo*, that the Court of Criminal Appeals did in fact *resentence* Petitioner under Section 51(A), which provides for a range of punishment from ten (10) years to life, the State of Oklahoma submits that the failure of the Oklahoma Legislature to include meaningful standards to guide the court in fixing punishment did not operate to fundamentally deprive Petitioner of due process of law.[20]

(*a*) As already noted in previous argument, the United States Constitution does not mandate the imposition or determination of punishment by a jury. However, the State of Oklahoma has statutorily created such a right; and, therefore, Petitioner must be afforded this procedural protection. The question remains, however, whether as part of the right to be sentenced by a jury, the sentence imposed against a noncapital offender must be guided by specific standards set out and authorized by statutory enactment.[21]

[19]*Gregg* v. *Georgia, Ibid* at 175-176:

> " 'In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people' . . . [T]he specification of punishments . . . 'are peculiarly questions of legislative policy.' "

[20]Respondent would likewise submit that even if the jury had been instructed to impose punishment pursuant to § 51(A) in this case, the lack of standards to guide their decision was equally not a denial of due process.

The answer to this question must begin with a discussion of the concept of individualized sentencing in criminal cases generally, which, although not constitutionally required, has been long accepted in this country. See *Williams* v. *New York*, 337 U.S. at 247-248; *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. at 55. In reviewing prior opinions of this Court dealing with the imposition of the death penalty, it is the apparent inability of a particular statute to permit this concept of individualized sentencing which has prompted the requirement that legislation contain specific guidelines for the jury or judge to consider either in aggravation or mitigation of punishment in a capital case. Clearly, the unique penalty of death has proffered a distinction by this Court between capital and noncapital cases.[22]

It is urged by Petitioner that two successive juries or the same judge in two successive cases could, within the "limits" set in Section 51(A), impose a life term for a person convicted of two separate charges of passing bad checks

[21]Petitioner argues that the "private interest" at stake is the loss of years of freedom incurred by Petitioner. Respondent, however, feels that the interest is much more narrowly confined to his asserted right to be sentenced by a jury in accordance with statutory guidelines and standards.

[22]In *Lockett* v. *Ohio*, 438 U.S. 586, note 13, this Court stated:

> "Sentencing in noncapital cases presents no comparable problems. We emphasize that in dealing with standards for imposition of the death sentence we intimate to view regarding the authority of a State or of the Congress to fix mandatory minimum sentences for noncapital crimes."

in separate face amounts of $21.00 apiece, and then sentence the next defendant to ten years imprisonment for first degree manslaughter, second degree rape, or robbery with a dangerous weapon, even though he may have had dozens of prior felony convictions.

In theory, Respondent submits that such a possibility exists; but in practical application, such a conclusion is not only unfounded,[23] but undermines this Court's long recognition of a State's entitlement to assume that jurors confronted with the truly awesome responsibility of decreeing [punishment] for a fellow human [would] act with due regard for the consequences of their decision.[24] Clearly, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes.

Thus, the State of Oklahoma submits that Section 51 (A) clearly follows the dictates of public policy; that being (1) the Legislative intent to provide progressively greater punishment for the habitual offender, and (2) the exercise of discretion either by judge or jury to afford individualized sentencing commensurate with the seriousness of the offense in proportion to the deserved punishment. To hold otherwise would create the existence of an inherent and fundamental deficiency in all decisions made by judge and jury.

(*b*) We next must deal with the procedures afforded by the State of Oklahoma to a noncapital offender who

[23]Petitioner does not cite specific instances where this proposed theory has resulted in such an impropriety.

[24]*McGautha* v. *California,* 402 U.S. at 208.

elects to have his punishment imposed by a jury. Oklahoma requires that an enhanced punishment be considered separate and apart from the issue of guilt or innocence. During the second stage, the defendant is allowed to present any evidence in mitigation of punishment or any evidence tending to attack the validity of the prior convictions produced by the prosecuting authority. Under the facts of this particular case, however, Petitioner Hicks elected to stand mute before the jury. The only procedural restriction placed upon a habitual offender in Oklahoma is the preclusion of a third-time or more offender to be afforded a pre-sentence investigation.

In addition to the aspects of sentencing at the trial level, Oklahoma makes available to the convicted offender the opportunity of direct appellate review, and post-conviction review[25] in order to have the initial sentence modified. Additionally, Petitioner has available such avenues as parole, earned good time credits, and statutory good time credits.

Unfortunately, and erroneously, in *Rogers* v. *Britton,* 476 F.Supp. 1036 (E.D. Ark. 1979)[26] (a recent case cited

[25]22 O.S. § 1080, *et seq.*

[26]*Rogers* v. *Britton* involved a 17-year-old black male convicted of forcible rape of a 21-year-old white woman. Rogers had no prior criminal record and his sentence imposed by a jury was life without parole. The range of punishment was thirty (30) years to life. The court in reversing the decision determined that the sentence violated due process in that the jury was given no guidelines or standards to follow. In so doing, the court applied an analytical framework espoused by this Court in *Parham* v. *J.L.,* ___ U.S. ___, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979), found at page 117 of the opinion. Respondent respectfully submits

in point by Petitioner), the United States District Court for the Eastern District of Arkansas determined that these procedures created a high risk of an erroneous determination. In doing so the District Court cited the public's need to have some assurance that the punishment set by the jury was based upon intelligible and neutral principles. Clearly, such a conclusion presupposes a freakish and arbitrary attitude which must necessarily be embodied in the minds of every juror or judge. Even assuming the jury was guided by specific standards when it imposed a life sentence against petitioner Rogers, under the District Court's own logic, "the jury could still have secretly disregarded them" (*Id.*, at 1042).

(c) As noted in *Rogers* v. *Britton*, supra, "requiring the articulation and application of sentencing standards before a verdict of life imprisonment is returned would impose some additional burden on the State." The position of the State of Oklahoma to this Court simply questions the need for sentencing standards under the structure of our criminal procedure. No burden is too great which ensures the viability of our criminal system of justice. On the other hand, Respondent fails to see the inherent deficiency alluded to by the Petitioner in allowing judge or jury to exercise its discretion in meting out punishment to the individual offender[27] without the assistance of specific guidelines.[28]

[26](Continued)
that the application of this standard by the district court to the *Rogers* case was in error. *Parham* dealt with the right of parents to commit their child to a mental institution and the validity of state procedures facilitating voluntary commitment. This Court reversed the decision and found Georgia's commitment procedures to be valid and not a violation of the due process clause.

In summation, Petitioner has not presented evidence which is clear and convincing that the discretion exercised by a judge or jury in fixing punishment against a habitual noncapital offender is anything less than a deliberate and good faith adjudication of a sentence deserved by the individual offender.

The State of Oklahoma submits that the imposition of punishment pursuant to Section 51(A) does not contravene fundamental due process procedures in total deference to the rights of the accused.

D. The Opinion of the Court of Criminal Appeals Contained Sufficient Rationale to Support the Affirmance of Petitioner's Sentence.

Petitioner intimates that the Oklahoma Court of Criminal Appeals violated due process when it failed to offer any rationale or basis for the "sentence" that it imposed against Petitioner. This analysis need only be reviewed within the context of the written but unpublished opinion of the Oklahoma Court in this case and the record which the court had before it on review. A summary examination reveals the court concluded that (1) the sentence was

[27]Unlike the State of Texas, Oklahoma does not prescribe mandatory life imprisonment for the habitual offender. *Rummel* v. *Estelle*, 568 F.2d 1193 (5th Cir. 1978), *rev'd* on rehearing *en banc*, 587 F.2d 651 (5th Cir. 1978), *remanded* on another issue, 590 F.2d 103 (5th Cir. 1979), *cert. granted*, ___ U.S. ___, 99 S.Ct. 2403, 60 L.Ed.2d 1064 (1979).

[28]*Ibid.*

well within the range of punishment established by the remaining provision of the Oklahoma Habitual Criminal Act under Section 51(A); (2) that Petitioner was not substantially prejudiced as a result of the jury's being instructed under Section 51(B); (3) that under the facts and circumstances of the case the punishment was not clearly excessive; and (4) that the court extended its rationale set forth in *Thigpen* v. *State*, 571 P.2d 447 (1977), to meet Petitioner's meritorious claim of the unconstitutional nature of Section 51(B).[29]

Clearly, a record on appeal void of sufficient facts to afford an adequate basis for affirming the judgment and sentence, must necessarily fail as an arbitrary and capricious exercise of discretion.

Respondent would, therefore, contest that the Oklahoma Court of Criminal Appeals constituted the "sentencing body" and was required to set forth a basis for their decision.

Even assuming this theory to be accurate,[30] the unpublished opinion was more than adequate for this Court to find a rational basis for their decision, or as Petitioner requests, an "explanation affording acceptance to that which we better understand."

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[29]See Note 43, *infra*.

[30]Petitioner applies a tripartite test under *Mathews* v. *Edridge*, 424 U.S. 319, 335, and *Goldberg* v. *Kelly*, 397 U.S. 254, 263-271, to evaluate whether due process requires a sentencing judge to state the reasoning behind his sentence. Under such a test, would Petitioner require this Court to set forth a written basis for its refusal to accept a particular case for review on Petition for Writ of Certiorari?

II. THE IMPOSITION OF FORTY (40) YEARS IMPRISONMENT ASSESSED AGAINST PETITIONER AS A THIRD-TIME HABITUAL OFFENDER UNDER THE OKLAHOMA HABITUAL CRIMINAL ACT, 21 O.S. SUPP. 1977, § 51 (A), WAS NOT EXCESSIVE, AND, THEREFORE, DOES NOT VIOLATE THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

A. The Term of Imprisonment Bears a Rational Relationship to the Goal of the Oklahoma Legislature to Provide Enhanced Punishment for Habitual Criminal Offenders and, Therefore, Does Not Constitute the Needless Imposition of Pain and Suffering.

Petitioner initially contends that Section 51(A) does not "rationally" relate to the acceptable goals of punishment or make a "measurable contribution" to such goals,[31] and, therefore, constitutes the cruel and unusual imposition of punishment which is expressly prohibited by the Eighth Amendment.[32]

The prior decisions of this Court have recognized that the Cruel and Unusual Clause circumscribes the criminal process in three ways: *first*, it limits the kinds of punishment that can be imposed on those convicted of crimes, *e.g.*,

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[31]See page 63, Petitioner's Brief.

[32]This Court has never held a sentence of imprisonment to constitute cruel and unusual punishment solely because of its length. The issue was considered in *Howard* v. *Fleming*, 191 U.S. 126; and, recently, the Fourth Circuit, sitting en banc in the case of *Davis* v. *Davis*, 585 F.2d 1226 (1978), en banc 601 F.2d 153 (1979), held that the imposition of a forty (40) year term of imprisonment and a $20,000.00 fine for the sale of nine ounces of marijuana were so disproportionate to the offense as to amount to cruel and unusual punishment in violation of the Eighth Amendment.

Estelle v. *Gamble,* 429 U.S. 97 (incarceration without medical care); *Trop* v. *Dulles,* 356 U.S. 86 (expatriation for desertion); *second,* it proscribes punishment grossly disproportionate to the severity of the crime, *e.g., Weems* v. *United States,* 217 U.S. 349 (15 years' imprisonment and other penalties for falsifying an official document); *Coker* v. *Georgia,* 433 U.S. 584 (execution for offense of rape); and *third,* it imposes substantive limits on what can be made criminal and punishment as such, *e.g., Robinson* v. *California,* 370 U.S. 660 (incarceration as a criminal for addiction to narcotics).[33]

Respondent submits that the instant case falls within the second category of decisions which prohibits grossly disproportionate punishment when measured against the severity of the crime.[34]

Thus, the controlling standard which is applicable to *this* particular case and determinative of whether the punishment in *this* particular case is excessive is agreeably governed by the test reaffirmed in *Coker* v. *Georgia,* 433 U.S. 584 at 592, wherein Mr. Justice White enumerated:

> "[A] punishment is 'excessive and unconstitutional if it (1) makes no measurable contribution to the accepted goals of punishment and hence is nothing more

[33]See *Ingraham* v. *Wright,* 430 U.S. 651 (1978).

[34]Although Petitioner candidly disputes the advancement of an argument setting forth the contention that the forty (40) years assessed in the case at bar is *per se* excessive, Petitioner does contend that in *this* case under *this* particular statute the punishment is excessive in that (1) the sentence makes no measurable contribution to acceptable goals of punishment and (2) because it was imposed in a reckless and arbitrary manner. See footnote 30, pages 61-62 of Petitioner's Brief.

> than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.' A punishment might fail the test on either ground."

Using this standard, Petitioner proceeds to enumerate four acceptable goals of punishment which this Court has identified on various occasions, *e.g.,* (1) rehabilitation, (2) deterrence, (3) isolation, and (4) retribution.

Rehabilitation — Under the theory of rehabilitation Petitioner contends that he cannot be subjected to enhanced punishment unless his prior convictions resulted in the imposition and the *serving* of actual jail time. Petitioner queries whether it can "rationally" be determined that an enhanced punishment is necessary or even useful if a normal prison term has not been tried first.

Petitioner likens the sentence rendered against him to a child threatened with spanking for telling lies, but when such threats fail to alter the child from a continued path of prevarication and on the telling of a third lie, a whiplashing results. We are not, however, dealing with a child's mentality in this case, but a 28-year-old male adult offender previously convicted of Assault and Battery with Intent to Kill and Second Degree Burglary. Thus, the so-called primary consideration of rehabilitation must necessarily be overridden by the interest of the Legislature to protect society from an individual who has exhibited a total disregard for the law on a continued basis. Taking Petitioner's argument to the other extreme would allow an offender to commit two murders before the sentence of death could be imposed for a third murder.

The State of Oklahoma, therefore, submits that the rationale of the Habitual Criminal Offender Act is predicated upon the failure of a repeat offender to heed the warnings of society to either conform or pay the penalty, not rehabilitation. To say that Petitioner is entitled to rehabilitation through incarceration before being subjected to enhanced punishment is in total abhorrence of the legislative intent and presupposes that incarceration is a guaranteed means of preventing future acts of criminal conduct. So long as Petitioner engaged in a course of criminal conduct, with a full understanding of the punishment he could receive, there can be no rational exception to his exposure to the full extent of punishment. In essence *there is no constitutional right to rehabilitation through incarceration,* and that is exactly what Petitioner would have this Court determine.

Deterrence — The constitutionality of recidivist statutes have long been upheld by this Court.[35] However, Petitioner argues that Section 51(A) makes no effort whatsoever to fit the punishment to the crime. It should be remembered that the legislative function primarily involves a determination of what constitutes a crime and the establishment of penalties for the commission of that crime,[36] and in

[35]*Oyler* v. *Boles,* 368 U.S. 448 (1961); *Gryger* v. *Burke,* 334 U.S. 728 (1948); *Graham* v. *West Virginia,* 224 U.S. 616, 623 (1912); *McDonald* v. *Massachusetts,* 180 U.S. 311, 312 (1901); *Moore* v. *Missouri,* 159 U.S. 673 (1895); *Wilson* v. *Slayton,* 470 F.2d 986 (4th Cir. 1972); *Wessling* v. *Bennett,* 410 F.2d 205 (8th Cir. 1969); *Price* v. *Allgood,* 369 F.2d 376 (5th Cir. 1956), *cert. den.,* 386 U.S. 998 (1967); see generally, Katkin, *Habitual Offender Laws: A Reconsideration,* 21 Buffalo L. Rev. 99 (1971).

[36]*Gregg* v. *Georgia,* 428 U.S. 153 at 175.

this connection, Petitioner proposes a number of acceptable formulas whereby the Legislature could differentiate between the extent of the punishment and the seriousness of the offense. It has equally been the recognized rationale that a punishment which allows the jury a wide range of years is much better suited to the individual offender and his presentation of mitigating factors or lack thereof, in arriving at his sentence. This result is clearly indicated when compared to those cases cited in the *Thigpen* decision[37] as well as sentences pronounced by courts and jurys throughout the country where the statute allows punishment within a wide number of years.

It may also be seen that the controversy surrounding the deterrent value of punishment has been exceedingly questioned by this Court in recent cases, specifically in instances involving the imposition of the death penalty. In *Gregg* v. *Georgia,* 428 U.S. 153, this Court noted the words of Lord Justice Denning[38] at page 381:

> "Punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment

[37]The appendix in *Thigpen* v. *State,* 571 P.2d 467 (Okl.Cr. 1977) gives examples such as the verdict of 999 years upon conviction of Robbery with Firearms after a former felony conviction. Other sentences for the same offense varied from 99 years, 59 years, and 40 years.

[38]Master of the Rolls of the Court of Appeal in England; Royal Commission on Capital Punishment, Minutes of Evidence, December 1, 1949, p. 207 (1950).

> as being deterrent or reformative or preventive and nothing else. . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, *because the wrong-doer deserves it,* irrespective of whether it is a deterrent or not." (Emphasis added)

Thus, it can be logically inferred that in the case of a habitual criminal the deterrent aspect is of much less importance in that the penalties punish the "status" of a repeat offender in order to afford society adequate protection. One is no less deserving of punishment even if the primary intent of the legislation is to deter further acts of criminal violence.

In summation, the only acceptable formula which can be promulgated in comparing punishment with the seriousness of the offense, must remain flexible; and although the jury may arguably be saddled with unbridled discretion; it cannot be said that in the majority of cases the decision of the jury to impose a sentence within the limits of the statute has been contra to the rudimentary demands of justice and fair play.

Isolation and Retribution — The State of Oklahoma would merely submit that in this particular case Petitioner Hicks exhibited conduct which required isolation from the outside world and past criminal acts deserving of punishment. It is apparent that Petitioner was neither intimidated or rehabilitated by reason of his prior confrontation with the criminal system of justice.

Petitioner increasingly alludes to the sentence received by his co-defendant. Although Jones received the minimum under 63 O.S. § 2-401, her sentence does not reflect a record

of prior convictions such as that displayed by Mr. Hicks.[39] Nor can this Court accordingly determine that the jury's pronouncement of the minimum sentence against the co-defendant in this cause infers an attitude of passion or sympathy. Clearly the Petitioner was no less deserving of forty (40) years than Jones was deserving of the minimum.[40]

In conclusion, the State of Oklahoma submits that the Eighth Amendment as construed by the decisions of this Court, is not shocked nor impassioned by the sentence of forty (40) years. A determination, on the basis of length alone, that the sentence in this case, based upon the entire record, is a needless imposition of pain and suffering, lacks sufficient merit to afford a finding of a fundamental constitutional deprivation which would require modification.

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[39]For brevity purposes Respondent would adopt by incorporation its argument presented in its original brief to this Court opposing Writ of Certiorari, filed with this Court on September 15, 1979, beginning at page 12. Therein Respondent sets forth penalties enacted by other states which are equivalent to Oklahoma's statutory scheme of punishment for habitual offenders, as well as additional case authority and argument with respect to the application of the standard of disproportionality to the punishment compared with the seriousness of the offense.

[40]There is no constitutional requirement that persons convicted of the same crime receive identical penalties. *Schnider* v. *People of State of Cal.*, 427 F.2d 1178, *cert. den.*, 401 U.S. 929.

B. The Court of Criminal Appeals Did Not Arbitrarily and Capriciously Impose Punishment in Violation of the Eighth Amendment Prohibition Against Cruel and Unusual Punishment.

Petitioner adapts basically the same argument presented under his due process contention in Proposition I of his Brief to a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.

The State of Oklahoma would merely submit that barring the finding of a fundamental error, the Court of Criminal Appeals is limited in its exercise of discretion to modify a judgment and sentence.[41]

The Court of Criminal Appeals has consistently held that the question of excessiveness of punishment must be determined by examination of all the facts and circumstances in each particular case. Further, unless the Court of Criminal Appeals can conscientiously say that under all facts and circumstances the sentence is so excessive as to shock the conscience of the court, it does not have the power to modify that sentence. See *Holding* v. *State*, 568 P.2d 332 (Okl.Cr. 1977); *Dodson* v. *State*, 562 P.2d 916 (Okl.Cr. 1977). In reviewing the reported decisions published by the Court of Criminal Appeals dealing with the imposition of sentence under Section 51(B),[42] as well as the unpublished opinions

[41] *Miles* v. *State*, 336 P.2d 930 (Okl.Cr.); *Simpson* v. *State*, 304 P.2d 1004; and *Woods* v. *State*, 292 P. 393.

[42] *Clonce* v. *State*, 588 P.2d 584; record shows jury was instructed under 21 O.S. Supp. 1977, § 51(B), that they could sentence the defendant to twenty-five (25) years. The jury, however, on a finding of guilt after one former conviction of a felony sentenced the defendant to ten

provided to this Court by Petitioner, it cannot be said that the standard of determining excessive punishment was ar-

[42] (Continued)
(10) years within the provisions of 21 O.S. Supp. 1977, § 51(A). The Court of Criminal Appeals *affirmed* Judgment and Sentence.

Coats v. *State*, 589 P.2d 693 (Okl.Cr.): defendant challenged on one of three convictions used by State during bifurcated sentencing proceeding which resulted in the jury imposing a sentence of 999 years. Court of Criminal Appeals sustained challenge to one prior conviction in that period of ten years had elapsed from time of commission of prior offense. Court *modified* sentence to fifty (50) years but otherwise affirmed.

Fischer v. *State*, 593 P.2d 507 (Okl.Cr. 1979): defendants argued that under 51(B) the maximum punishment for conviction would be 27 years as opposed to the discretionary sentence imposed under 51(A) by the jury against Clay of 37 and 30 years. The Court of Criminal Appeals *affirmed* Judgment and Sentence.

Kitchens v. *State*, 576 P.2d 775 (Okl.Cr. 1978): defendant sentenced by jury under Section 51(B). Court of Criminal Appeals *affirmed* sentence of 27 years holding defendant had not been prejudiced by use of this statute in light of *Thigpen* decision holding Section 51(B) unconstitutional.

Nepps v. *State*, 576 P.2d 310 (Okl.Cr. 1978): Court of Criminal Appeals *modified* sentence from 25 years to 12 years. Defendant had two prior felonies of Grand Larceny and subsequently was found guilty of Knowingly Concealing Stolen Property. The court specifically found no error other than relying on its decision of *Thigpen* v. *State*.

Barrett v. *State*, 573 P.2d 1221 (Okl.Cr. 1978): The trial court imposed a life sentence for offense of Rape in the First Degree After Former Conviction of a Felony. The Court of Criminal Appeals noted the language of trial court as desiring to sentence defendant to 10 to 15 years but instead felt bound by Section 51(A) to impose a sentence of life. The Court of Crimial Appeals found punishment to be excessive and *reduced* sentence to 15 years.

Drennon v. *State*, 581 P.2d 901 (Okl.Cr. 1978): defendant was charged, tried and convicted for offense of Attempting to Obtain Controlled Drugs by Forged Prescription, After Former Conviction of a

bitrarily and capriciously applied by the court to the detriment of defendant.[43]

Petitioner cannot possibly argue with merit that the sentence imposed by the Court of Criminal Appeals "struck with lightning", and, therefore, is "unusual", inasmuch as Petitioner was ably represented on appeal by the Public Defender's Office, and briefs were submitted by both parties on the issue of Section 51(B). This constitutes notice and

[42] (Continued)

Felony. His punishment was fixed at thirty (30) years. Based on its *Thigpen* decision, Court of Criminal Appeals *modified* sentence to twenty (20) years.

King v. *State*, 586 P.2d 756 (Okl.Cr. 1978): defendant was tried and convicted of Second Degree Burglary, After Former Conviction of a Felony. The jury, pursuant to Section 51(B), sentenced defendant to 27 years imprisonment. Court of Criminal Appeals *modified* sentence from 27 years to 18 years relying on *Thigpen*.

[43] See 20 O.S. § 3001, which provides:

> "*Harmless error.*—No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless it be the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a *substantial* violation of a constitutional or statutory right." (Emphasis added)

Although this section was repealed by the Oklahoma Legislature effective October 1, 1978, by the enactment of the Oklahoma Evidence Code, 12 O.S. § 2104, this particular statutory provision was alluded to by the Oklahoma Court of Criminal Appeals in *Thigpen*, supra; and Respondent submits that this doctrine of harmless error was applied in cases subsequent to *Thigpen* even though at the time the court reviewed Hicks' appeal, the statutory provision had been repealed.

an opportunity to be heard within the framework of the Due Process Clause.[44]

It is submitted by the State that so long as the record sufficiently justifies the sentence and the court is not overly shocked by the excessive nature of the penalty there can be no finding of cruel and unusual punishment in violation of the Eighth Amendment.

III. PETITIONER'S CLASSIFICATION AS A THIRD-TIME OFFENDER AND SUBJECT TO PUNISHMENT PRESCRIBED BY 22 O.S. 1977, § 51(B), DID NOT DEPRIVE HIM OF FEDERAL AND STATE GUARANTEED RIGHTS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Under his final proposition of error, Petitioner asserts that the classification by the Oklahoma Legislature of habitual criminals under two sections of the Oklahoma Habitual Criminal Act, to-wit: Sections 51(A) and Section 51(B), operated to deprive Section 51(B) offenders of the right to be sentenced by a jury and, thus, resulted in a violation of the Equal Protection Clause of the Fourteenth Amendment. To demonstrate this violation, Petitioner applies two tests: (a) the traditional "rational basis" test and (b) the strict

[44] There is no constitutional right under the Due Process Clause of the Federal Constitution to a hearing or oral argument on appeal. *Galarza* v. *Jimenez Oxio*, 440 F.Supp. 47 (1977); *Price* v. *Johnston*, 334 U.S. 266 (1944). Petitioner was afforded the right to an appellate review by the State of Oklahoma at public expense. Therefore, the failure of the Court of Criminal Appeals to grant oral argument in Petitioner's case cannot form the basis for a claim of an arbitrary and capricious determination of punishment synonomous with the imposition of cruel and unusual punishment. *Weber* v. *United States*, 104 F.2d 300 (1939); *United States* v. *Koptik*, 300 F.2d 19 (1962).

scrutiny test. Petitioner's analysis contends that under both tests a constitutional deprivation of equal protection resulted.

(a) This Court has held that the Equal Protection Clause permits discrimination between classes but requires that the classification bear some rational relationship to a permissible object sought to be attained by the statute. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1. Under the so-called "rational basis" test, the Oklahoma Court of Criminal Appeals determined that Section 51(B) did not comport with the Legislature's rational goal of enhancement of punishment for habitual offenders. In doing so the court did not invalidate the *classification* of habitual criminals, as was noted in the Appendix to the *Thigpen* decision, which stated:

> "The legislature could, without committing constitutional error, single out a classification of persons who would be affected by legislation. This was what it intended to do by passage of that amendatory language contained in 21 O.S. 1976 Supp. § 51. The legislature could, further, within that classification relating to habitual offenders, make a distinction between the punishments for second felony offenders and that punishment for third or subsequent offenders. Such classification and sub-classification would have a reasonable relation to the obvious public purpose sought to be achieved by such legislation.
>
> "The finished product of the legislature did not do this, however."

The application of the traditional standard of review requires initially an analysis of the class identified by the statute and singled out for special treatment. Only where

that class exhibits involuntary characteristics such as alienage and race has this Court invalidated specific legislation as being inherently suspect and violative of the Equal Protection Clause. *Loving* v. *Virginia,* 338 U.S. 1; *Graham* v. *Richardson,* 403 U.S. 365.

To substantiate his analysis under the traditional "rational basis" test, Petitioner cites the Oklahoma Court's holding in *Thigpen* v. *State,* as a clear indication of a recognized unconstitutional classification, *i.e.,* habitual criminals prosecuted under Section 51(B).

In holding Section 51(B) unconstitutional, the Oklahoma Court of Criminal Appeals sought to protect those individuals sentenced under Section 51(A) from a denial of equal protection, not Section 51(B) offenders. The court found Section 51(B) vague and illusory when construed with the legislative intent of providing progressively greater punishment, in that the practical application of instructing the jury under Section 51(B) had a contra effect by limiting punishment. With the invalidation of Section 51(B), the class of violators in which Petitioner belonged was dissolved and all habitual offenders were placed in one category subject to a sentence ranging from ten years to life.

At this point it should be remembered that whether a habitual offender is sentenced under Section 51(A) or Section 51(B), there is no distinction between the procedures followed at trial for purposes of sentencing, *i.e.,* each offender is afforded a separate sentencing hearing before the jury, each is entitled to representation by counsel, and each is afforded the opportunity to present evidence in mitigation of punishment.

Petitioner does not advance the theory that the overall classification of Petitioner and others similarly situated as habitual criminals is unlawful.[45] Clearly, it was not Petitioner's classification as a habitual offender which deprived him of his liberty, but his own volitional acts of misconduct. Therefore, Petitioner's argument that Section 51(B) was an unlawful classification of habitual criminals is erroneous.

Once it has been established that the class singled out is not a prohibited classification nor inherently "suspect", then the only remaining consideration is whether there exists a rational basis, as opposed to a *compelling* state interest under the strict scrutiny test, to achieve the permissible object sought to be attained by the statute. That States have the authority to enact recidivist legislation classifying individuals as habitual criminals has long been abrogated to an unquestioned principle.

Clearly, the question then narrows and becomes whether the State of Oklahoma can advance a rational basis for depriving Section 51(B) offenders of the asserted right to being resentenced anew in light of the Court of Criminal Appeals determination that Section 51(B) was invalid.

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[45]Petitioner in Note 52 of his brief asserts that any argument based upon Petitioner's voluntary decision to commit additional offenses would "miss the point." Respondent submits that it is this very standard of voluntary control which is the distinguishing feature inherent in what this Court has recognized as a suspect classification subject to the "strict scrutiny" test. If in fact this Court determined that every criminal incarcerated was effectively denied his right to procreate, *i.e.*, a fundamental interest, then every criminal statute would be subject to the "strict scrutiny" test. Such being the case, the State's burden of coming forward with a compelling state interest, as opposed to a rational basis, would apply to every enactment of criminal legislation.

First, Oklahoma has no statutory vehicle for providing *any* criminal with a new penalty proceeding subsequent to appellate review. Even were the reviewing court, for some reason, to invalidate the punishment assessed by a jury under Section 51(A), the Section 51(A) offender would likewise have no asserted right to be resentenced anew.

Second, such a requirement would abrogate the inherent authority of the Oklahoma Court of Criminal Appeals to impartially review any judgment and sentence. 22 O.S. § 1066.

Third, the validity of a new sentence in excess of that initially rendered would create grave implications and on appellate review would conceivably result in a reduction to the first term of sentence.

Fourth, although the fiscal burden which might be incurred in resentencing Section 51(B) offenders would be minimal, the practical application would require a complete new trial in order for the jury to consider the underlying felony which resulted in the charge of "habitual offender."

In summation, the Oklahoma Legislature properly singled out a class of individuals as habitual criminals for the purpose of enhancing their punishment. Neither those offenders sentenced under Section 51(A) or Section 51(B) were denied or afforded any additional procedural right which was guaranteed by the laws or the State of Oklahoma or the Constitution of the United States, thereby creating an equal protection violation.

(b) Under Petitioner's second test, "strict scrutiny", this Court is urged to review Oklahoma's holding as the creation of a suspect classification impinging upon Petitioner's fundamental liberty interests.

In support of his contention, Petitioner cites this Court's rulings in *Loving* v. *Virgina*, 338 U.S. 1; *Graham* v. *Richardson*, 403 U.S. 365, and *Glona* v. *American Guarantee & Liability Ins.*, 391 U.S. 73, all covering the subjects of race, alienage and illegitimacy and the corresponding discrimination associated therewith.

Even though Petitioner tries to use these cases as authoritative guidelines for this Court's use, a quick glance reveals no material similarity with the instant case. The defendant Hicks was not involuntarily classified as a habitual offender; it was not an accident of birth that caused two prior felony violations. Therefore, Petitioner's second test fails for lack of similarity to the equal protection afforded to the groups to which this Court's "strict scrutiny" test was intended to apply.

In conclusion, the Petitioner has been afforded all federal and state guaranteed rights of equal protection and, if any irregularity exists, that irregularity does not rise to the dignity of a substantial prejudice or of a constitutional violation of equal protection.

CONCLUSION

For the above and foregoing reasons, the State of Oklahoma submits that the Judgment and Sentence be affirmed and this Court deny Petitioner's request to be resentenced anew, or in the alternative, released from confinement.

Respectfully submitted,

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